

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2013AP2380
2013AP2381
2013AP2382
2013AP2383**

**Cir. Ct. Nos. 2009CM325
2009CM371
2009CF179
2009CF299**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL C. O'BRIEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County:
JAMES A. HABECK, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Michael O’Brien appeals an order denying his “Petition for Writ of Habeas Corpus Pursuant to WIS. STAT. § 974.06,”¹ in which he alleged ineffective assistance of counsel. O’Brien contends his no-contest pleas to numerous offenses were “uninformed” because his trial attorney spent only a half hour with him from the time of his arrest to the plea hearing; counsel failed to communicate with O’Brien about matters learned in discovery; and based on information O’Brien discovered after sentencing, he believes he had potential issues relating to the validity of traffic stops. Based on counsel’s denials of O’Brien’s allegations, the circuit court rejected O’Brien’s claims. We affirm the order.

BACKGROUND

¶2 In four separate complaints, O’Brien was charged with numerous felony and misdemeanor counts. Pursuant to a plea agreement, he entered no-contest pleas to fourth- and fifth-offense operating a vehicle while intoxicated, possession of cocaine, resisting an officer, and seven counts of bail jumping. Other counts were dismissed and read in for sentencing purposes.

¶3 O’Brien was represented by Assistant State Public Defender Steven Weerts in each of these cases. At the hearing on O’Brien’s habeas petition or WIS.

¹ Habeas corpus and a postconviction motion under WIS. STAT. § 974.06 are distinct methods for collaterally attacking a conviction. Under § 974.06(8), a petition for a writ of habeas corpus cannot be presented until the procedure under § 974.06 has been exhausted or is not applicable. See *Peterson v. State*, 54 Wis. 2d 370, 381, 195 N.W.2d 837 (1972). Section 974.06 would be inapplicable if O’Brien is no longer in custody for these offenses, a fact that was not discussed at the motion hearing or in the briefs on appeal. Therefore, it is not clear how the present petition or motion should be construed. However, we need not resolve that question because O’Brien’s claim of ineffective assistance of trial counsel fails under either label.

STAT. § 974.06 motion, Weerts testified he was unable to recall specific details regarding his representation of O'Brien four years before the hearing. However, Weerts could recall meeting with O'Brien at the jail and speaking with him on the telephone. Weerts testified that O'Brien's allegations of little contact or communication regarding discovery and failure to fully inform O'Brien of the effect of his no-contest pleas were not consistent with Weerts's usual practices.

DISCUSSION

¶4 A defendant claiming ineffective assistance of trial counsel must establish deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the context of guilty or no-contest pleas, he must show that, but for counsel's alleged deficiencies, he would not have pled guilty or no contest, and instead would have proceeded to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶5 O'Brien has not established deficient performance because his accusations depend on his own credibility and the circuit court found Weerts more credible than O'Brien. O'Brien contends his specific recollections should prevail over Weerts's assurances that were based on his usual practices. The weight of the testimony and the credibility of the witnesses is a matter for the circuit court. *State v. Young*, 2009 WI App 22, ¶17, 316 Wis. 2d 114, 762 N.W.2d 736. The court was not required to accept O'Brien's self-serving accusation that Weerts failed to follow his usual practice.

¶6 In addition, as the circuit court noted, some of O'Brien's current allegations are inconsistent with statements he made on the plea questionnaire and waiver of rights form. The court also indicated its own usual practice would have been to establish that O'Brien had sufficient time to consider the State's offer, and

the court's colloquy would have informed O'Brien of his right to a trial and the potential penalties. O'Brien has not provided this court with a transcript of the plea hearing. Therefore, this court must assume the missing transcript supports the circuit court's ruling. See *State v. McAttee*, 2001 WI App 262, ¶5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774.

¶7 O'Brien has not established prejudice from his counsel's alleged failure to discuss with O'Brien the rights he was giving up by pleading no contest. Nothing in the record contradicts the circuit court's finding that O'Brien entered his pleas after the court fully informed him of his rights. Therefore, his counsel's alleged failure to provide the same information would not have caused O'Brien to enter uninformed pleas. O'Brien failed to meet the requirement set out in *Hill* that he establish he would not have entered his no-contest pleas but for his counsel's alleged deficiencies. *Hill*, 474 U.S. at 59. At the hearing on his petition/motion, when asked whether he would have made a different decision regarding his pleas had he been fully informed, O'Brien responded: "Well, I don't know. It's something I would really like to—I would really like to discuss at length with somebody. I don't know if I would make a different decision, but I would certainly like to explore my options."

¶8 O'Brien also failed to establish prejudice from his counsel's failure to challenge the validity of the traffic stops. The circuit court concluded there was no basis for such a challenge, and O'Brien does not present any argument on appeal to challenge that conclusion.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

